No. 06-84

IN THE
Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, ET AL.,
Petitioners,
v.
CHARLES BURR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

SUSAN H. EPHRON
SAFECO INSURANCE COMPANY OF AMERICA
Safeco Plaza
4333 Brooklyn Avenue, NE
Seattle, Washington 98185
(206) 545-5000

LISA E. LEAR
JOHN A. BENNETT
BULLIVANT HOUSER BAILEY PC
888 S.W. Fifth Avenue
Suite 300
Portland, Oregon 97204
(503) 228-6351

November 13, 2006

MICHAEL K. KELLOGG
Counsel of Record
SEAN A. LEV
DEREK T. HO
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL P. KENNY
CARI K. DAWSON
ALSTON & BIRD, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7179

Counsel for Petitioners

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding that a defendant can be found liable for a "willful" violation of the Fair Credit Reporting Act ("FCRA") upon a finding of "reckless disregard" for FCRA's requirements, in conflict with the unanimous holdings of other circuits that "willfulness" requires actual knowledge that the defendant's conduct violates FCRA.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon were defendants in the district court proceedings and appellees in the court of appeals proceedings.

Safeco Corporation was named as a defendant in the original complaint but subsequently was voluntarily dismissed from the case by plaintiffs during the district court proceedings.

Charles Burr and Shannon Massey were plaintiffs in the district court proceedings and appellants in the court of appeals proceedings. Lori Spano, Alan Opoien, Patricia McGrath, and Joan Horton were also at one time or another, and some still are, plaintiffs in the district court proceedings, but none of them participated in the court of appeals proceedings and thus are not respondents in this case.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, petitioners Safeco Insurance Company of America, American States Insurance Company, Safeco Insurance Company of Illinois, and Safeco Insurance Company of Oregon state the following:

Safeco Insurance Company of Oregon is a wholly owned subsidiary of Safeco Insurance Company of America. Safeco Insurance Company of America, American States Insurance Company, and Safeco Insurance Company of Illinois are wholly owned subsidiaries of Safeco Corporation, a publicly traded company. Safeco Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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H.R. 19410, 91st Cong. (1970) 26

H.R. Conf. Rep. No. 91-1587 (1970) 26

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1970 U.S.C.C.A.N. 4416 26

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S. 3678, 91st Cong. (1970) 25

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3 Norman J. Singer, *Sutherland Statutory Construction* (6th ed. 2001) 36

OPINIONS BELOW

The memorandum order of the Ninth Circuit (Pet. App. 1a-2a) is unreported but is available at 140 F. App'x 746, 2005 WL 1865971. The Ninth Circuit based its decision in this case, as well as in several related cases, entirely on its published opinion in two other related and consolidated cases, *Reynolds v. Hartford Financial Services Group, Inc.* and *Edo v. GEICO Casualty Co.* The original consolidated opinion in *Reynolds* and *Edo* is reported at 416 F.3d 1097 (Pet. App. 37a-68a). On petitions for rehearing and rehearing *en banc*, the panel withdrew its original opinion and issued a modified opinion, which, as amended, is reported at 426 F.3d 1020 (Pet. App. 69a-101a). On defendants' second petition for rehearing and rehearing *en banc*, the panel issued yet another modified opinion, which is reported at 435 F.3d 1081 (Pet. App. 102a-131a). The district court's April 21, 2003 opinion and order (Pet. App. 15a-35a) is reported at 215 F.R.D. 601; its March 3, 2004 opinion and order (Pet. App. 3a-14a) is not reported.

JURISDICTION

The judgment of the Ninth Circuit (Pet. App. 1a-2a) was entered on August 4, 2005. The Ninth Circuit denied a timely petition for rehearing and rehearing *en banc* on April 20, 2006. *See* Pet. App. 36a. The petition for a writ of certiorari was filed on July 19, 2006, and was granted on September 26, 2006 (JA 81). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* ("FCRA"), are set forth in the statutory addendum to this brief.

STATEMENT OF THE CASE

Under FCRA, if a "user" of consumer reports takes an "adverse action" based on information contained therein, that user must provide the consumer with an "adverse action" notice containing specified information. *See* 15 U.S.C. § 1681m. In the insurance context, an "adverse action" triggering FCRA's notice requirement is defined as "a denial or cancellation of, an increase in any charge for, or a reduction or other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." *Id.* § 1681a(k)(1)(B)(i).

Respondents Charles Burr and Shannon Massey are two of three co-representatives of a purported class consisting of "all purchasers of personal lines of insurance from" petitioners for the period January 2000 to the date of the complaint. JA 71 (Fourth Am. Compl. ¶ 1). Petitioners are, directly or indirectly, wholly owned by Safeco Corporation (collectively, "Safeco" or "petitioners"). Respondents claimed that petitioners took "adverse actions with respect to plaintiffs and those similarly situated" based on information in those plaintiffs' consumer credit reports and then willfully "failed to provide . . . notification of the adverse action," as required by § 1681m. *Id.* (Fourth Am. Compl. ¶ 3).

Respondents' complaint alleged *no* actual damages to themselves or to the class, but instead sought to recover statutory damages, punitive damages, costs, and attorney's fees. *See* JA 72-73 (Fourth Am. Compl. ¶¶ 11-13).[1] Under FCRA, recovery of statutory and punitive damages is permitted only on proof that a person "*willfully* fail[ed] to comply" with FCRA. *See* 15 U.S.C. § 1681n(a) (passed as § 616 of FCRA) (emphasis added). Recovery for a "negligent" failure to comply with FCRA is restricted to actual damages, costs, and attorney's fees. *See id.* § 1681*o*

[1] After remand from the court of appeals, respondents dropped their claim for punitive damages. *See* Pet. Reply 4 n.2.

(passed as § 617 of FCRA). The definition of a "willful" violation of FCRA is at the heart of this case.

Respondents' theory of liability was that Safeco had taken an "adverse action" against them based on their consumer credit information, not because Safeco had increased the premium on an *existing* insurance policy, but because it had used consumer credit information in setting the *initial* premium on a *new* insurance policy higher than the best possible rate that the insurer offered to others for the relevant form of insurance. This theory of "adverse action" had never been adopted by any court at the time of respondents' complaint.

Safeco moved for summary judgment on the ground that its actions in offering an initial premium higher than the best possible rate did not trigger a notice requirement under FCRA. The district court agreed. It held that FCRA "'unambiguously'" does not require an adverse-action notice where an insurer uses credit information in setting an initial premium. Pet. App. 11a-12a (quoting *Mark v. Valley Ins. Co.*, 275 F. Supp. 2d 1307, 1317 (D. Or. 2003)). It observed that the "'common and ordinary meaning'" of the term "increase" is to "'make[] greater,'" *id.* at 11a (quoting *Mark*, 275 F. Supp. 2d at 1317), and it therefore concluded that § 1681a(k)(1)(B)(i)'s definition of "adverse action" — which covers "an increase in any charge for . . . insurance" — "'unambiguously means an insurer does not increase a charge for insurance unless the insurer charges an insured one price for insurance and then subsequently increases that charge based on information in the insured's consumer credit report,'" *id.* at 11a-12a (quoting *Mark*, 275 F. Supp. 2d at 1317).

The Ninth Circuit reversed. *See id.* at 1a-2a, 102a-131a. It held that Safeco had taken an adverse action against respondents in its offer of initial coverage because the phrase "increase in any charge" covers "a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price." *Id.* at 114a-117a; *see id.* at 2a. In the

court's view, an "adverse action" occurs "whenever a consumer pays a higher rate because his credit rating is less than the top *potential* score." *Id.* at 118a (emphasis added). This was the first time that such an expansive definition of "adverse action" had been accepted by any court.

The Ninth Circuit went on to reject Safeco's alternative ground for affirmance of the district court's summary judgment — namely, that Safeco's conduct could not have been "willful" in light of the competing interpretations of the statute and the absence of any judicial or administrative decision defining "adverse action" to cover initial policies of insurance. On this point, the Ninth Circuit departed from the law of every other circuit to address the issue and held that "willfully" under FCRA requires mere "reckless disregard" for, rather than actual knowledge of, the Act's requirements. Further, notwithstanding the district court's holding that Safeco's legal position on the "best rate" issue was "unambiguously" correct, the Ninth Circuit declared that Safeco's position was so "indefensible" and "implausible" as to create a triable issue on the question of willfulness under the court's newly fashioned "reckless disregard" standard. *Id.* at 129a.

A. Background of FCRA

FCRA was enacted in 1970 primarily to regulate "consumer reporting agenc[ies]," which are broadly defined to include companies that collect, compile, and furnish "consumer reports." 15 U.S.C. § 1681a(f). A "consumer report" includes any information communicated to a third party that "bear[s] on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" and that is used (or expected to be used) in determining the consumer's eligibility for credit, insurance, employment, or certain other purposes. *Id.* § 1681a(d).

Congress viewed the accurate reporting of consumer information as important "to promote efficiency in the Nation's banking system and to protect consumer privacy."

TRW Inc. v. Andrews, 534 U.S. 19, 23 (2001). Thus, for example, FCRA requires a consumer reporting agency (*e.g.*, a credit bureau such as Experian, Trans Union, and Equifax) to: (i) maintain "reasonable procedures to assure maximum possible accuracy of the information" the agency reports on consumers; (ii) exclude obsolete information from consumer reports; (iii) disclose consumer reports only to those that have one of the specified permissible purposes to receive them; (iv) allow consumers to access their consumer file and correct information the agency maintains about them; and (v) "reinvestigate" information in the report that the consumer disputes, and delete any information that cannot be verified. *See* 15 U.S.C. §§ 1681c, 1681e, 1681g, 1681h, 1681i.

FCRA remained largely unchanged until 1996, when Congress passed extensive amendments as part of the Consumer Credit Reporting Reform Act of 1996, Pub. L. No. 104-208, Div. A, Tit. II, Subtit. D, 110 Stat. 3009, 3009-426 ("CCRRA"). Among other revisions, these amendments expanded FCRA to cover not only consumer reporting agencies, but also "furnishers of information" — *i.e.*, any "person" that generates consumer credit information and provides it to a consumer reporting agency. *Id.* § 1681s-2(a); *see id.* § 1681a(b) (defining "person" to include individuals and corporate entities). Information furnishers must, among other things, provide accurate information to credit reporting agencies; investigate disputed information from customers; and inform customers about negative information that may be put in their consumer report. *See id.* § 1681s-2(a), (b).

Most pertinent to this case, FCRA also imposes obligations on a third group — namely, users of consumer reports. *See id.* § 1681m. Although the term "user" is not defined in FCRA, it is understood to include any person or entity that obtains consumer reports to determine the consumer's eligibility for credit, insurance, employment, and the other purposes enumerated in § 1681a(d). In recent years, insurance companies such as Safeco have

begun to use such information in the underwriting of insurance. *See id.* § 1681a(d)(1)(A) (defining "consumer report" to include information used for "insurance" of a "personal, family, or household" nature); *id.* § 1681b(a)(3)(C) (defining underwriting of insurance as a permissible purpose for obtaining consumer reports).

Users may obtain consumer reports only for one of the permissible purposes enumerated in the statute, and they must certify to the consumer reporting agency that they will not use the reports for any other purpose. *See id.* §§ 1681b, 1681e(a). Moreover, users of consumer-credit information are required by FCRA to provide notices containing specified information if they take any of a number of defined "adverse actions" against a consumer based in whole or in part on a consumer report. *See id.* § 1681m(a) (requiring notices where the user "takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report").

B. Respondents' Claims

On October 2, 2001, plaintiff Lori Spano filed, in the United States District Court for the District of Oregon, a purported nationwide class action against Safeco Corporation for alleged violations of FCRA's "adverse action" notice requirement. The complaint alleged that Safeco Corporation's failure to provide such notices was "willful" and thus entitled plaintiffs to class-wide statutory damages, punitive damages, and attorney's fees under § 616 of FCRA, 15 U.S.C. § 1681n. *See* Pet. App. 3a-4a, 23a, 26a. The complaint contained no allegation that plaintiffs had suffered any actual damages. *See id.* at 4a, 26a.

Spano claimed that she purchased an automobile insurance policy from Safeco National Insurance Company that was subsequently endorsed to Safeco Insurance Company of Oregon ("Safeco-Oregon"). The policy was cancelled four times for failure to pay the premium; each time, it was reinstated by Safeco-Oregon without reference to any consumer credit information. After the policy was

cancelled for a fifth time, Spano requested that Safeco-Oregon reinstate it yet again. Safeco-Oregon declined to do so, based in part on information contained in a consumer credit report. Spano alleged that this decision not to reinstate was an "adverse action" under FCRA entitling her to notice. *See id.* at 4a, 5a.

Spano later added other named plaintiffs, including respondents Massey and Burr. *See id.* at 24a; JA 4, 72 (Fourth Am. Compl. ¶ 8). Burr applied for automobile insurance in July 2001 and was issued a policy by American States Insurance Company ("American States"). *See* Pet. App. 4a. American States underwrote the policy through InsurQuest, a program designed for high-risk drivers. *See* E.R.[2] 4 (¶ 11). InsurQuest places a driver into one of five pricing tiers, designated A through E, based on the totality of the driver's underwriting characteristics. *See id.* Burr was placed in Tier D, mainly because of his poor driving record. *See id.* Although his consumer credit information was consulted in placing him in Tier D, even the most favorable credit score would not have improved his tier placement or reduced his premium. *See id.*; Pet. App. 4a. After the American States policy lapsed for failure to pay premiums on July 7, 2002, Burr purchased a new policy from Safeco-Oregon, which relied on information in Burr's consumer credit report in setting the amount of Burr's initial premium. *See* Pet. App. 4a-5a.

Massey applied for renters insurance from Safeco Insurance Company of Illinois ("Safeco-Illinois") in January 2001. Safeco-Illinois used a consumer credit report in connection with the underwriting of Massey's policy. Safeco-Illinois has three tiers of renters insurance. Based on the totality of the circumstances relevant to her application, Safeco-Illinois placed Massey in a tier with a higher premium rate. *See id.* at 4a.[3]

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[2] "E.R." refers to the Excerpts of Record filed in the court of appeals.

[3] Originally, the sole defendant in the district court was Safeco Corporation. After Burr and Massey were added as plaintiffs, plaintiffs

C. The District Court's Decision

On March 3, 2004, the district court granted Safeco's motion for summary judgment against Burr and Massey on the ground that no "adverse action" had been taken against either of them. Pet. App. 11a-12a. Relying on its previous decision in *Mark v. Valley Insurance Co.*, the court agreed with Safeco that an "adverse action" occurs only when an insurance company "increases" — *i.e.*, "'makes greater'" — a premium that the company had previously charged the consumer for insurance. Pet. App. 11a (quoting 275 F. Supp. 2d at 1317). The court held that FCRA was "'unambiguous[]'" on this score, and it reaffirmed its conclusion in *Mark* that FCRA "'reasonably cannot be read to mean an insurer takes adverse action if it initially charges an insured more than its optimal rate based on information in the insured's consumer credit report.'" *Id.* (quoting 275 F. Supp. 2d at 1317). The district court accordingly dismissed the claims of Burr and Massey because neither had an existing policy with the issuing company at the time he or she applied for insurance. *See id.* at 12a.

As to plaintiff Spano, however, the court denied Safeco's motion for summary judgment. It held that Spano's "request for reinstatement" of her previously cancelled policy was an "application for insurance" and that FCRA's notice requirement was triggered when Safeco-Oregon

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voluntarily dismissed Safeco Corporation as a defendant and substituted Safeco Insurance Company of America ("Safeco-America"). Safeco-America moved to dismiss on the ground that the policies purchased by the three named plaintiffs were issued not by Safeco-America, but by its affiliates, Safeco-Oregon, Safeco-Illinois, and American States. In an opinion and order dated April 21, 2003, the district court granted Safeco-America's motion for summary judgment, holding that only a person who contracts with the insured can take an "adverse action" under § 1681m(a). *See* Pet. App. 20a-22a. The Ninth Circuit reversed this ruling. *See id.* at 2a. The district court also granted plaintiffs' motion to file a Fourth Amended Complaint substituting the issuing insurers as defendants. *See id.* at 34a.

"denied" the application on the basis of information in her consumer credit report. *Id.* at 12a-13a.

After the district court entered final judgment against plaintiffs Burr and Massey under Federal Rule of Civil Procedure 54(b), they appealed. *See* JA 17. By stipulation of all parties, further proceedings as to plaintiff Spano were stayed pending the disposition of the appeal. *See id.*

D. The Ninth Circuit's Decision

The Ninth Circuit reversed the grant of summary judgment to Safeco based on the reasoning in its concurrently filed decision in *Reynolds* and *Edo*. Whereas the district court had concluded that the meaning of "increase" "unambiguously" required an addition to some previous charge, and thus could not apply to a "single *initial* charge for the insurance coverage," Pet. App. 11a-12a (emphasis added), the Ninth Circuit adopted the so-called "best rate" theory, concluding that the "clear" and "ordinary meaning" of "increase" covered "a charge that is higher than it would otherwise have been but for the existence of some factor that causes the insurer to charge a higher price," *id.* at 114a-117a. *See id.* at 1a-2a.

Again relying on *Reynolds* and *Edo*, the Ninth Circuit also rejected Safeco's alternative contention that its conduct was not "willful" and therefore could not give rise to liability for statutory and punitive damages under § 1681n. In an acknowledged departure from the decisions of the Sixth and Eighth Circuits, both of which require "actual knowledge with regard to the law" as a prerequisite to the imposition of statutory and punitive damages, the Ninth Circuit held that a "willful" violation of FCRA could be established if a company performs an act that in fact violates FCRA "either knowing that the action violates the rights of consumers or in reckless disregard of those rights." *Id.* at 128a-129a & n.17; *see id.* at 2a. The Ninth Circuit purported to follow this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), which held that "reckless disregard" was a

"reasonable" way of interpreting "willful" in the context of the liquidated damages provision of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 626(b), "[g]iven the legislative history" of that provision, 469 U.S. at 126. *See* Pet. App. 127a.

In its initial opinion in *Reynolds* and *Edo* dated August 4, 2005, the Ninth Circuit panel divided on the proper disposition of the case. The panel majority, consisting of Judge Reinhardt and Judge Berzon, not only reversed the district court's grant of summary judgment to the defendant companies, but also effectively granted summary judgment to plaintiffs, despite the fact that plaintiffs had never requested such relief. The majority stated that defendants' interpretation of "adverse action" was "objectively unmeritorious," "not reasonable," and "counter to the statute's plain text." *Id.* at 64a. It followed, in the majority's view, that "defendants all acted in reckless disregard of the consumers' statutory rights." *Id.* at 65a. Judge Bybee dissented, stating that he would remand the case because he "[could not] conclude on the basis of the record before [him] that the companies' actions . . . were so 'objectively unmeritorious' . . . that [the court] [could] decide their willfulness . . . without the benefit of findings of fact." *Id.* at 68a.

On petition for rehearing and rehearing *en banc*, the panel issued a modified opinion on October 3, 2005.[4] The modified opinion merely altered several phrases in the initial opinion — for example, replacing the characterizations "unreasonable" and "not reasonable" with "indefensible" and "untenable," and "objectively unmeritorious" with "plainly unmeritorious." *Id.* at 96a-97a. In response, Judge Bybee expanded his dissent. He stated that, on the record before him, he would "not find that [Safeco] willfully failed to comply with FCRA as a matter of law."

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[4] The panel amended its October 3, 2005 opinion *sua sponte*, in an unpublished order issued on October 24, 2005. That amendment affected only footnote 7 and was incorporated into the October 3 opinion reported at 426 F.3d 1020 (reproduced at Pet. App. 69a-101a).

Id. at 100a. Although Judge Bybee agreed with the majority that the district court's interpretation of § 1681a(k)(1)(B)(i) was incorrect, he could not "go so far as to conclude that the district court's conclusion, like [Safeco's] position, was also untenable." *Id.*

After a second petition for rehearing and rehearing *en banc*, the panel issued yet another modified opinion on January 25, 2006. This time, instead of effectively granting summary judgment to plaintiffs on the ground that Safeco's conduct was willful as a matter of law, the panel remanded the case for the district court to apply the "reckless disregard" standard in the first instance. *See id.* at 129a; *id.* at 2a.

In so doing, the Ninth Circuit instructed that, in the proceedings on remand, the district court should engage in a subjective inquiry into the company's motives. Safeco had urged a finding that as a matter of law its reading of FCRA was not objectively unreasonable, given that the term "adverse action" was at best ambiguous in its application to the circumstances presented here (and had been found unambiguously to support a contrary result by the district court) and given the lack of any prior judicial guidance supporting the Ninth Circuit's construction. The court of appeals nevertheless apparently deemed Safeco's interpretation "implausible," warranting a further subjective inquiry. *Id.* at 129a. The court also opined that, on remand, Safeco's good-faith reliance on the advice of its counsel would "not [be] dispositive," *id.*, a holding that the court deemed necessary to avoid "creat[ing] perverse incentives for companies covered by FCRA to avoid learning the law's dictates by employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 128a. The Ninth Circuit thus directed the district court to require Safeco to introduce "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* at 129a.

SUMMARY OF ARGUMENT

The Ninth Circuit erroneously interpreted "willfully" in § 1681n to mean with "reckless disregard" for, rather than actual knowledge of, the requirements of FCRA. The text, history, structure, and purposes of FCRA, as well as the consistent interpretation of § 1681n by eight other circuits for more than 20 years, all support the conclusion that "willfully" in this context requires proof that the defendant intentionally violated a known legal duty. But even if "willfully" could reasonably include some acts taken without knowledge of their illegality, the Ninth Circuit erred in holding that Safeco could be liable for a "willful" violation in the circumstances of this case. Safeco's reading of "adverse action" did not involve the kind of objectively indefensible interpretation that, at a minimum, should be necessary for a "willful" violation. Moreover, there is no statutory or precedential basis for the Ninth Circuit's requirement that courts look behind good-faith reliance on legal advice in determining willfulness.

The Ninth Circuit's decision furthers no legitimate statutory purpose. Instead, it simply rewards plaintiffs' lawyers with enormous recoveries for what a single court determines, in hindsight and without any basis in prior precedent, to be a violation of highly technical statutory provisions, even where there is no claim that any consumer has actually been damaged. That result is not, and cannot be, what Congress intended when it enacted FCRA.

I. The text, history, structure, and purposes of FCRA all indicate that, to establish a "willful" violation under § 1681n, one must show a deliberate violation of a known legal duty, not mere reckless disregard for the possibility that one's conduct is unlawful.

A. 1. The text of § 1681n(a) confirms that Congress meant "willfully" to mean acting with "actual knowledge" of, rather than mere "reckless disregard" for, the statute's requirements. Section 1681n(a)'s civil remedy for "willful" violations applies to all substantive "requirements" of

FCRA, but Congress singled out one such requirement for specific mention — namely, obtaining a consumer report "knowingly without a permissible purpose." 15 U.S.C. § 1681n(a)(1)(B). That prohibited conduct — which was perhaps Congress's central concern in passing FCRA — requires actual knowledge of the law (namely, the permissible uses of consumer reports under § 1681b). Because the term "willfully" in § 1681n(a) necessarily applies to the violation identified in subsection (a)(1)(B), it cannot sensibly be read to mean mere reckless disregard. It would be illogical to prohibit *recklessly* obtaining a consumer report "knowingly without a permissible purpose." Moreover, it would be odd for Congress to require a lower level of intent for conduct that was of secondary concern relative to the improper use of consumer reports.

The language of § 1681n(b) fortifies that conclusion. That subsection creates a separate civil damages action for a consumer reporting agency harmed by anyone obtaining a consumer report "knowingly without a permissible purpose." This section also requires actual knowledge, but, unlike § 1681n(a), it does *not* allow punitive damages even for a knowing violation. Given that punitive damages are a "quasi-criminal" remedy, it would also be irrational for Congress to permit such damages in § 1681n(a) on a showing of intent lesser than that required in § 1681n(b).

2. This reading of § 1681n is further buttressed by the overall remedial structure of FCRA — in particular, §§ 1681q and 1681s. Section 1681s allows the Federal Trade Commission ("FTC"), the agency charged with enforcing FCRA, to bring an action for a civil penalty of up to $2,500 per violation, with no provision for punitive damages, against any person "[i]n the event of a knowing violation, which constitutes a pattern or practice of violations of [FCRA]." 15 U.S.C. § 1681s(a)(2)(A). As with § 1681n(b), it would have been bizarre for Congress to impose a lower standard of intent in § 1681n(a), which *does*

authorize punitive damages, than in § 1681s(a)(2)(A), which, like § 1681n(b), clearly requires actual knowledge.

Section 1681q provides for criminal liability (in the form of both fines and imprisonment) for anyone who "knowingly and willfully" obtains a consumer report under false pretenses. "Willfully" in the context of § 1681q clearly requires actual knowledge, and the word should be given the same meaning in § 1681n. Congress's 1996 amendments back up this conclusion. Prior to 1996, courts had held that criminal liability for "knowingly and willfully" violating § 1681q could be a ground for civil liability, but only under § 1681n (for "willful" violations), not § 1681*o* (for "negligent" violations), because one cannot "negligently" violate a statute requiring "knowing and willful" conduct. In 1996, Congress effectively codified these decisions by expressly allowing for enhanced recovery for such violations under § 1681n, but not § 1681*o*. *See id.* § 1681n(a)(1)(B). This confirms that a "willful" violation under § 1681n requires the same level of intent as that required to show a criminal violation under § 1681q.

B. The drafting history of FCRA also confirms that "willfully" in § 1681n requires actual knowledge, not mere reckless disregard. The Senate bill containing FCRA originally provided that recovery of *actual* damages under current § 1681*o* required a showing of "gross[] negligen[ce]" — a term that is synonymous with "reckless disregard." "Willfully," the threshold condition for statutory and punitive damages, must therefore have required something more than gross negligence or reckless disregard — namely, actual knowledge of the illegality of the conduct. Although the Conference Committee reduced the *scienter* requirement in § 1681*o* from gross negligence to ordinary negligence, it did not make any corresponding change in the "willfully" standard, indicating that the Senate's original meaning was enacted in the final legislation. Beyond that, Congress had before it alternative bills that expressly authorized statutory and punitive damages for reckless conduct, but it chose not to enact them.

C. The courts of appeals have consistently held since at least the mid-1980s that civil liability for willful violations under § 1681n requires that the defendant act "knowingly," "intentionally," or with "conscious disregard" of the law. Mere "reckless disregard" of the law's requirements does not constitute a "willful" violation under this standard. Congress has overhauled FCRA several times, and amended § 1681n in particular, without disturbing these decisions, which were unanimous until the Ninth Circuit's decision below. In *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985), by contrast, this Court adopted a "reckless disregard" standard under the ADEA only after finding that Congress had passed that statute against the backdrop of the opposite judicial consensus.

D. A requirement of actual knowledge also advances the goals of FCRA better than the alternative. FCRA already provides for compensatory damages, as well as costs and attorney's fees, for negligent violations. *See* 15 U.S.C. § 1681*o*. Section 1681n calls for potentially enormous statutory and punitive damages and should therefore be reserved for the most egregious, deliberate conduct. Allowing these remedies on a showing of mere "reckless disregard" will impose enormous compliance costs on American businesses, lead to a flood of unnecessary and likely confusing notices to consumers, chill legitimate business activities, and frustrate Congress's goal of balancing consumer interests and the legitimate commercial use of consumer credit information.

E. Any residual ambiguity should be resolved in favor of a requirement of actual knowledge under the rule of lenity. That interpretive canon should apply to § 1681n given the "quasi-criminal" character of statutory and punitive damages provisions. The canon is of added importance in construing a statute like FCRA, which permits the imposition of massive liability without *any* showing of actual damages or any cap on class-action damages.

F. Under an actual-knowledge standard, Safeco was entitled to summary judgment because no court had ever declared that companies must send adverse-action notices in the context of initial policies of insurance, and Safeco could therefore not have known of its legal duty to do so.

II. Even if this Court were to conclude that "willfully" under FCRA could, in some cases, cover conduct engaged in without knowledge of its illegality, this Court should reject the Ninth Circuit's extreme interpretation and application of the term in this case.

A. As a matter of law, a legal interpretation that is not objectively indefensible cannot be reckless or willful. Here, petitioners' interpretation was far from legally indefensible. The only adverse action alleged by respondents is an "increase in any charge" for insurance. One cannot "increase" a charge that does not yet exist; the relevant statutory phrase does not naturally include an increase relative to a nonexistent, hypothetical charge. The Ninth Circuit's view that Safeco's reliance on that interpretation was so plainly unreasonable that it amounts to a "willful" violation of FCRA is untenable, especially given the technical nature of the issue, the district court's conclusion that the statute "unambiguously" *supported* Safeco's interpretation, and the lack of any prior case law to the contrary.

B. The Ninth Circuit also erred in concluding that a company can be deemed to have violated FCRA "willfully" despite good-faith reliance on the advice of its counsel if its legal position is later deemed "implausible" by an appellate court. That holding is contrary to this Court's decisions, and it would lead to intrusive and unwarranted factual investigations into the attorney-client relationship, as well as the decision-making processes of American corporations. It would also force companies to incur potentially enormous and unnecessary compliance costs, out of concern that their good-faith judgments about the proper interpretation of FCRA will, in hindsight, be deemed "willful."

ARGUMENT

I. THE TERM "WILLFULLY" IN FCRA REQUIRES THAT A DEFENDANT COMMIT A VOLUNTARY ACT IN CONTRAVENTION OF A KNOWN LEGAL DUTY

The term "willful" or "willfully" in federal statutes has been given "'many meanings,'" and it is therefore impossible to say that any single interpretation is always plain. *Bryan v. United States*, 524 U.S. 184, 191 (1998) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)). At times, "willful" has been held merely to "denote[] an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *United States v. Murdock*, 290 U.S. 389, 394 (1933). This Court has recognized, however, that Congress generally intends "willful" to require a measure of *scienter*. In some cases, this Court has construed the term to mean a "voluntary, intentional violation of a known legal duty" — *i.e.*, to take an action despite actual knowledge that it is contrary to the law's demands. *United States v. Bishop*, 412 U.S. 346, 360 (1973) (citing, *inter alia*, *Murdock*, 290 U.S. at 398); *Bryan*, 524 U.S. at 191 n.12 ("[t]he word is also employed to characterize a thing done without ground for believing it is lawful"); *see also Bryan*, 524 U.S. at 196; *Ratzlaf v. United States*, 510 U.S. 135, 146 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991). In other contexts, specifically the ADEA and the Fair Labor Standards Act of 1938 ("FLSA"), this Court has held that willfulness is satisfied by a lower "reckless disregard" standard. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985) (holding that "a violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA") (internal quotation marks omitted); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134-35 (1988) (applying same standard to the FLSA's statute of limitations provision); *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 617 (1993).

The choice among these competing options "'is often influenced by [statutory] context.'" *Ratzlaf*, 510 U.S. at 141 (quoting *Spies*, 317 U.S. at 497) (alterations in original omitted). In the case of § 1681n, all the interpretive guideposts point toward construing "willfully" to require a "voluntary, intentional violation of a known legal duty." The reasonableness of this conclusion is reinforced by this Court's decisions stating that "willfully" should be construed narrowly in the context of "highly technical statutes that present[] the danger of ensnaring" persons engaged in conduct that is not obviously unlawful. *Bryan*, 524 U.S. at 194 (citing *Ratzlaf*).

A. The Language of § 1681n and FCRA's Other Remedial Provisions Support an Actual-Knowledge Requirement

Every textual indicator in FCRA points toward the conclusion that the term "willfully" in § 1681n requires proof of an intentional violation of a known legal duty.

1. The Text of § 1681n Indicates That "Willfully" Requires Actual Knowledge, Not Mere Reckless Disregard

a. Section 1681n(a). The term "willfully" in § 1681n(a) must logically entail an actual-knowledge requirement because that section encompasses a substantive violation in § 1681n(a)(1)(B) that expressly requires knowledge as an element. Under § 1681n(a), "[a]ny person who willfully fails to comply with any requirement" of FCRA "with respect to any consumer is liable to that consumer" for specified damages — including the greater of actual or statutory damages (§ 1681n(a)(1)), punitive damages (§ 1681n(a)(2)), and costs and attorney's fees (§ 1681n(a)(3)).

Section 1681n(a)(1) goes on to specify two tiers of actual and statutory damages for two circumstances covered by § 1681n(a). Under § 1681n(a)(1)(A), the default recovery for an ordinary willful violation of FCRA is "any actual damages sustained by the consumer . . . or damages of not

less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). Section 1681n(a)(1)(B) provides that, "in the case of liability of a natural person for obtaining a consumer report under false pretenses or *knowingly* without a permissible purpose," plaintiffs may recover "actual damages sustained by the consumer . . . or $1,000, whichever is greater." *Id.* § 1681n(a)(1)(B) (emphasis added). In both circumstances, plaintiffs may also recover punitive damages and attorney's fees. *Id.* § 1681n(a)(2), (3). In all events, recovery under *either* § 1681n(a)(1)(A) or § 1681n(a)(1)(B) must still be predicated on a *willful* violation of FCRA. *See id.* § 1681n(a).

The violation covered by § 1681n(a)(1)(B) — obtaining a consumer report "under false pretenses or *knowingly without a permissible purpose*" — clearly requires knowledge of the relevant legal standard governing the acceptable uses of consumer reports. *See id.* § 1681b. Although the word "knowingly" sometimes implies mere factual knowledge, *see Bryan*, 524 U.S. at 192, the straightforward grammatical reading of § 1681n(a)(1)(B) is that the adverb "knowingly" modifies "without a permissible purpose," such that knowledge of the unlawfulness of the purpose is required. Mere neglect, or even reckless disregard of the possibility that an intended use might not be permitted, is not enough. The natural reading of § 1681n(a)(1)(B) is buttressed by the statutory presumption that *scienter* terms such as "knowingly" are broadly applied to cover the relevant statutory elements giving rise to liability, even when such an interpretation would *deviate* from the "most natural grammatical reading" of the statute. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68, 69-71 (1994) (citing numerous cases).[5]

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[5] This canon has particular force given that FCRA's parallel criminal provision provides for criminal fines and up to two years' imprisonment for "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses." 15 U.S.C. § 1681q.

In light of the fact that § 1681n(a)(1)(B) encompasses an offense with a *scienter* requirement of actual knowledge, the term "willfully" in § 1681n(a) — which applies equally to both subsections of § 1681n(a)(1) — cannot be read to mean mere recklessness. Simply put, it makes no sense to read § 1681n(a) and § 1681n(a)(1)(B) together to provide for damages for *recklessly* obtaining a consumer report "knowingly without a permissible purpose." *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Because willfulness *can only* mean actual knowledge in the context of § 1681n(a)(1)(B), it should be given a similar meaning as applied to § 1681n(a)(1) in all its applications. *See Ratzlaf*, 510 U.S. at 143 ("A term appearing in several places in a statutory text is generally read the same way each time it appears," and there is "even stronger cause to construe a *single* formulation . . . the same way each time it is called into play.") (citing *United States v. Aversa*, 984 F.2d 493, 498 (1st Cir. 1993) (en banc), *vacated and remanded on other grounds sub nom. Donovan v. United States*, 510 U.S. 1069 (1994)).

Moreover, interpreting "willfully" to require less than actual knowledge would undermine the rationality of Congress's remedial scheme. *See*, *e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted). Congress's central concern in passing FCRA was to eliminate certain impermissible and abusive uses of consumer information. *See*, *e.g.*, 15 U.S.C. § 1681(b) (noting the need for "reasonable procedures" to ensure the "proper utilization" of consumer information). Notably, the only criminal penalties in FCRA relate to this type of conduct. *See id.* §§ 1681q, 1681r. The prohibition on obtaining consumer information for

impermissible purposes is thus at the heart of FCRA's objectives, yet Congress chose to require a showing of *actual knowledge* as a precondition to both the award of statutory and punitive damages and the imposition of criminal sanctions. *See also infra* pp. 23-25 (explaining that the derivation of § 1681n(a)(1)(B) from FCRA's criminal provision, § 1681q, provides further proof that actual knowledge is required under both). It would be peculiar to conclude, as the Ninth Circuit did, that a *lower* threshold of intent — "reckless disregard" — is sufficient in other contexts (such as the failure to provide a notice) that are closer to the periphery of Congress's concerns. *See also* 15 U.S.C. § 1681m(h)(8) (codifying 2003 amendment to FCRA eliminating civil cause of action under either § 1681n or § 1681*o* for violations of § 1681m).

b. Section 1681n(b). A comparison of § 1681n(b) with § 1681n(a) confirms that "willfully" cannot mean "with reckless disregard." Section 1681n(b) provides that "[a]ny person who obtains a consumer report from a consumer reporting agency under false pretenses or knowingly without a permissible purpose shall be liable to the consumer reporting agency for actual damages . . . or $1,000, whichever is greater." 15 U.S.C. § 1681n(b). As explained above, the language of § 1681n(b) requires actual knowledge that the purpose for which the report was obtained is legally impermissible; this is the most grammatically natural reading of the phrase "knowingly without a permissible purpose," and it comports with the presumption that the term "knowing" applies to *all* elements needed to give rise to liability.

Section 1681n(b), unlike § 1681n(a), provides for neither punitive damages nor costs and attorney's fees. Given that punitive damages are generally reserved for the most reprehensible conduct, *see BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996), judged by the defendant's mental state, *see Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538 (1999), Congress must have intended the *mens rea* to be *at least as high* for § 1681n(a) as for

§ 1681n(b). It would impute to Congress a high degree of irrationality to interpret § 1681n(a), which allows for the "extraordinary sanction" of punitive damages, *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979), to have a lower *scienter* requirement than § 1681n(b), which does not. The Ninth Circuit's contrary interpretation is flawed because it leads to an anomalous outcome that is inconsistent with the structure of FCRA as a whole. *See Brown & Williamson*, 529 U.S. at 132-33; *Thurston*, 469 U.S. at 128 (courts should "decline to interpret" provisions in a way that frustrates Congress's intent to create a rational tiered liability scheme).

2. Defining Willfulness As Mere Reckless Disregard Is Inconsistent with the Remedial Structure of FCRA As a Whole

This reading of § 1681n(a) is reinforced by the statute's overall remedial scheme. In particular, the language of §§ 1681q and 1681s bolsters the conclusion that to act "willfully" under § 1681n means to act in deliberate violation of a known FCRA duty.

a. Section 1681s. Under § 1681s, the FTC "may commence a civil action" against any person "[i]n the event of a knowing violation, which constitutes a pattern or practice of violations of [FCRA]." 15 U.S.C. § 1681s(a)(2)(A). "In such action, such person shall be liable for a civil penalty of not more than $2,500 per violation." *Id.* Congress thus required the FTC to prove a "knowing" violation of FCRA to recover even a modest civil penalty of $2,500. It is difficult to believe that Congress intended to allow a private party to recover both statutory and unlimited punitive damages by proving merely a *reckless* violation of FCRA, when the government agency charged with enforcing FCRA must prove a *knowing* violation. The most sensible understanding of the "willfully" requirement in § 1681n(a), read in light of § 1681s, is that it can be satisfied only by a showing of actual knowledge.

b. Section 1681q. Section 1681q provides that "[a]ny person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses" is subject to criminal fines and up to two years' imprisonment. 15 U.S.C. § 1681q. Section 1681r complements § 1681q in imposing criminal liability on "[a]ny officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information." *Id.* § 1681r. The term "willfully" in these provisions requires a showing that the defendant "'acted with knowledge that his conduct was unlawful.'" *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bryan*, 524 U.S. at 192). Under settled principles of statutory construction, the same meaning should be given to the word "willfully" in § 1681n. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("[T]he normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning.") (internal quotation marks omitted).

Congress's amendments to FCRA in 1996 confirm that the same *scienter* requirement applies under § 1681n. Prior to 1996, courts grappled with the question whether a violation of § 1681q could give rise to civil liability under § 1681n or § 1681*o* – a question raised because there was no specific provision (other than § 1681q) restricting users of consumer information from obtaining reports for an impermissible purpose as defined by § 1681b. The courts generally answered the question in the affirmative, reasoning that the criminal prohibition was a "requirement" of FCRA upon which civil liability could be premised for "fail[ure] to comply." *E.g.*, *Hansen v. Morgan*, 582 F.2d 1214, 1219 (9th Cir. 1978). Several courts noted, however, that civil liability could be predicated only on § 1681n, not on § 1681*o*, because only a "willfulness"

requirement was consistent with § 1681q's "knowing and willful" *mens rea* standard.[6]

In the 1996 amendments to FCRA, Congress implicitly adopted the reasoning of these decisions by making a violation of § 1681q a basis for enhanced civil liability under § 1681n (governing "willful" violations), but *not* under § 1681*o* (governing "negligent" violations). *See* 15 U.S.C. § 1681n(a)(1)(B) (creating special damages for "willfully" "obtaining a consumer report under false pretenses or knowingly without a permissible purpose"). The clear implication of Congress's amendment is that § 1681n, but not § 1681*o*, is consistent with the mental state required under § 1681q, and thus that § 1681n alone "is the proper vehicle for civil liability for violations of Section 1681q." *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 368 n.1 (6th Cir. 1984). The 1996 amendments also bolster the conclusion that Congress viewed § 1681n as a fundamentally punitive measure to be interpreted *in pari materia* with § 1681q. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (punitive damages "serve the same purposes as criminal penalties"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (describing punitive damages as "quasi-criminal"). Against this backdrop, acting "willfully" must

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[6] *See, e.g.*, *Kennedy v. Border City Sav. & Loan Ass'n*, 747 F.2d 367, 368-69 & n.1 (6th Cir. 1984) ("Since violation of Section 1681q occurs only when an individual acts knowingly and willfully, Section 1681n rather than Section 1681*o* is the proper vehicle for civil liability for violations of Section 1681q."); *Rice v. Montgomery Ward & Co.*, 450 F. Supp. 668, 671 (M.D.N.C. 1978) ("[S]ince § 1681q requires the information to have been knowingly and willfully obtained under false pretenses, a person may be held civilly liable pursuant only to § 1681n which covers willful failure to comply with the FCRA and not under § 1681*o* which pertains to negligent noncompliance with the FCRA."); *Graziano v. TRW, Inc.*, 877 F. Supp. 53, 56 n.5 (D. Mass. 1995) (calling a negligent violation of a statute requiring willfulness "a logical impossibility"); *Letscher v. Swiss Bank Corp.*, Civ. No. 94-8277, 1996 WL 183019, at *6 (S.D.N.Y. Apr. 16, 1996) (same); *accord Northrop v. Hoffman of Simsbury, Inc.*, 134 F.3d 41, 47 n.7 (2d Cir. 1997) (citing *Kennedy* with approval as "correctly" decided).

mean acting with knowledge that one's conduct violates the law — the same mental state needed to support a criminal conviction under § 1681q.

B. The Drafting History of § 1681n Demonstrates That "Willfully" Means More Than "With Reckless Disregard"

In addition to FCRA's plain language, the statute's drafting history evinces Congress's intent to require proof of a defendant's voluntary act in the face of a known legal duty before statutory and punitive damages may be awarded. *See*, *e.g.*, *Doe v. Chao*, 540 U.S. 614, 622 (2004) (relying on the drafting history of the Privacy Act of 1974 to hold that plaintiffs must show actual damages in order to recover); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 302-03 (2002) (Thomas, J., joined by Rehnquist, C.J., & Scalia, J., dissenting) (relying on prior versions of the Equal Employment Opportunity Act of 1972 to interpret the EEOC's authority to seek victim-specific relief against private employers). While the drafting history of the ADEA may have supported a "reckless disregard" standard, *see Thurston*, 469 U.S. at 125-26, the drafting history of FCRA clearly does not.

FCRA provides for actual, statutory, and punitive damages for "willful" violations, *see* 15 U.S.C. § 1681n, and actual damages alone for "negligent" violations, *see id.* § 1681*o*. In the original Senate bill that became FCRA, however, recovery of even actual damages under what became § 1681*o* required a showing of "gross[] negligen[ce]." *See* S. 823, 91st Cong. § 617 (1969), *reprinted at* 116 Cong. Rec. 32,641 (Sept. 18, 1970).[7] The term "gross negligence" was understood at the time of FCRA's passage to be synonymous with "reckless disregard." *See*, *e.g.*, *Restatement (Second) of Torts* § 282 cmt. e (1965) (stating that the phrase "gross negligence" in statutes is usually construed

[7] Senate bill 823 was passed by the Senate as part of a broader Senate banking bill, S. 3678, 91st Cong. (1970). *See* 116 Cong. Rec. 32,638-39 (Sept. 18, 1970) (statement of Sen. Proxmire).

to mean "reckless disregard"); *Black's Law Dictionary* 1185-86 (4th ed. 1968) ("Words 'gross negligence,' are equivalent to words 'reckless and wanton.'"). Thus, the original Senate bill's "willfulness" standard must have required a higher degree of intentionality than gross negligence or reckless disregard — namely, a deliberate violation of a known legal duty.

In the Conference Committee, the conferees ultimately adopted a House amendment to the Senate bill reducing from gross negligence to ordinary negligence the standard for actual damages under what became § 1681*o*. *See* H.R. Conf. Rep. No. 91-1587, at 30 (1970), *reprinted at* 1970 U.S.C.C.A.N. 4411, 4416 ("The House amendment to section 617, which was agreed to by the conferees, would establish liability for actual damages sustained as a result of ordinary negligence, instead of only as a result of gross negligence as provided in the Senate bill."). The Conference Committee, however, left intact the "willfulness" prerequisite for statutory and punitive damages, without reducing the required *scienter* to "recklessness" or "gross negligence." *See id.*

This was by no means an oversight. The House had before it alternative bills that would have expressly allowed statutory and punitive damages for either "grossly negligent or willful" violations. *See* H.R. 19403, 91st Cong. § 52 (1970); H.R. 19410, 91st Cong. § 52 (1970). These alternatives were never adopted by the House, nor were they proposed by the House conferees as amendments to the Senate bill, much less accepted by the Conference Committee as part of the final legislation. Thus, the House agreed with, and enacted into law, the meaning of "willfully" as it stood in the original Senate bill, which required proof that the defendant acted in knowing violation of the law.

C. Twenty Years of Settled Judicial Interpretation of § 1681n Requiring Actual Knowledge Confirms Congress's Intent

Consistent with the text, history, and structure of FCRA, eight circuit courts of appeals have consistently held, for more than 20 years, that "willfully" in § 1681n means "knowingly and intentionally" committing an act in "conscious" or "deliberate and purposeful" disregard of FCRA's requirements. In construing a similar statutory "willfulness" requirement in *Ratzlaf*, this Court "count[ed] it significant that [18 U.S.C.] § 5322(a)'s omnibus 'willfulness' requirement . . . consistently has been read by the Courts of Appeals to require both 'knowledge of the reporting requirement' *and* a 'specific intent to commit the crime,' *i.e.*, 'a purpose to disobey the law.'" 510 U.S. at 141 (quoting circuit court cases). Likewise, the long line of court of appeals decisions consistently construing "willfully" in § 1681n to require a showing of actual knowledge reinforces both the correctness of that interpretation and the error of the Ninth Circuit's contrary view.

Starting as early as the Sixth Circuit's decision in *Kennedy v. Border City Savings & Loan Association*, and continuing until the decision below, the courts of appeals were unanimous in their understanding of § 1681n's willfulness requirement. The Fifth Circuit's statement of the rule is typical: to be liable under § 1681n, a defendant must have "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986). Numerous decisions to the same effect are listed in the footnote.[8]

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[8] *See Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1369 (10th Cir. 1987) (per curiam); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967, 972 (4th Cir. 1987); *Stevenson v. TRW Inc.*, 987 F.2d 288, 293 (5th Cir. 1993); *Arriola v. Safeco*, No. 92-35321, 1993 WL 530480 (9th Cir. Dec. 21, 1993) (judgment noted at 15 F.3d 1082); *Philbin v. Trans Union Corp.*, 101 F.3d 957, 970 (3d Cir. 1996); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998); *Bakker v. McKinnon*, 152 F.3d 1007, 1013 (8th Cir. 1998); *Cousin v. Trans Union*

As the Eighth Circuit explained in *Phillips v. Grendahl*, 312 F.3d 357 (8th Cir. 2002), "[u]nder this formulation the defendant must commit the act that violates [FCRA] with knowledge that he is committing the act and with intent to do so, and he must also be conscious that his act impinges on the rights of others." *Id.* at 368. "Reckless disregard" is not enough. *See id.* at 369 (expressly rejecting that standard); *accord Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004) ("To act willfully, a defendant must knowingly and intentionally violate the Act, and it 'must also be conscious that [its] act impinges on the rights of others.'") (quoting *Phillips*, 312 F.3d at 368) (alteration in original); *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005) (quoting *Wantz*); *Bagby v. Experian Info. Solutions, Inc.*, 162 F. App'x 600, 605 (7th Cir. 2006) (same); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) (holding that, under § 1681n, a defendant must act "knowingly and willfully").

Indeed, whenever these courts have applied the *mens rea* requirement of § 1681n to the facts of a particular case, they have consistently inquired whether there was evidence showing that the defendant knew that his conduct violated the law.[9] Consistent with these precedents,

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Corp., 246 F.3d 359, 372 (5th Cir. 2001); *Dalton v. Capital Assoc. Indus., Inc.*, 257 F.3d 409, 418 (4th Cir. 2001); *Northrop v. Hoffman of Simsbury, Inc.*, 12 F. App'x 44, 50 (2d Cir. 2001); *Sapia v. Regency Motors of Metairie, Inc.*, 276 F.3d 747, 753 (5th Cir. 2002); *Phillips v. Grendahl*, 312 F.3d 357, 368 (8th Cir. 2002); *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 900 (4th Cir. 2003); *Wantz v. Experian Info. Solutions*, 386 F.3d 829, 834 (7th Cir. 2004); *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603, 610 (7th Cir. 2005); *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 364 (6th Cir. 2005); *Bagby v. Experian Info. Solutions, Inc.*, 162 F. App'x 600, 605 (7th Cir. 2006). *See also* Pet. 14-19.

[9] *See*, *e.g.*, *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469, 476 (2d Cir. 1995) (rejecting plaintiffs' Rule 60(b) motion because proffered evidence "does not support the kind of 'conscious disregard' or 'deliberate and purposeful' actions necessary to make out a claim for willful noncompliance under the FCRA") (citing *Pinner*, 805 F.2d at 1263);

a prominent treatise on model federal jury instructions states that, under FCRA, "[t]he term 'willfully' means an omission or failure to do an act voluntarily and intentionally, and with specific intent to fail to do something the law requires to be done, in other words, with a purpose either to disobey or disregard the law." 3A Kevin F. O'Malley *et al.*, *Federal Jury Practice & Instructions* § 153.39 (5th ed. 2000); *accord id.* § 153.71 (same formulation in jury instructions for punitive damages under FCRA).

This unanimous appellate precedent and the resulting lower-court practice is particularly significant because, after these decisions had made clear that willful violations require actual knowledge, Congress overhauled FCRA several times without making any change to the "willfully" standard in § 1681n. By 1996, when Congress passed the CCRRA and specifically amended § 1681n, among other FCRA provisions, four circuits had already interpreted the "willfully" standard in § 1681n to require proof of a knowing violation. *See Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir. 1986); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368 (10th Cir. 1987) (per curiam); *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967 (4th Cir. 1987); *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469 (2d Cir. 1995). Moreover, after the 1996 CCRRA, Congress revised the substantive requirements of FCRA without altering what by then was the unanimous opinion of eight circuits that actual knowledge is required to find a "willful" violation of FCRA. *See* Fair and Accurate Credit Transactions Act of

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Yohay, 827 F.2d at 972 & n.8 (upholding jury's verdict for plaintiff under § 1681n only after finding "considerable evidence" that defendant credit union "consciously ignored" plaintiff's rights because its manager "acted purposefully and with full knowledge of what she was doing"); *Zamora*, 811 F.2d at 1370-71 (affirming jury verdict of willful violation under § 1681n because trial testimony indicated that bank employees "knew the permissible purposes for obtaining consumer reports" and "knew they could not access the records of a spouse when checking the credit of an individual").

2003, Pub. L. No. 108-159, § 312(f), 117 Stat. 1952, 1993; *see also* Consumer Reporting Employment Clarification Act of 1998, Pub. L. No. 105-347, 112 Stat. 3208. Congress is presumed to know of such judicial interpretations when it amends a statute and to implicitly endorse consistent interpretations of language that it declines to change. *See*, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 391 n.92 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

The history of judicial interpretation of FCRA stands in stark contrast to that of the ADEA and the FLSA, which this Court relied on in adopting a different standard for "willful" conduct in *Thurston*. *Thurston* relied heavily on the fact that the ADEA was modeled on the FLSA, which the circuit courts had consistently interpreted to provide for liability if the employer "knew *or showed reckless disregard*" for whether his conduct was prohibited. *See Thurston*, 469 U.S. at 126 (citing *Nabob Oil Co. v. United States*, 190 F.2d 478, 479 (10th Cir. 1951)) (internal quotation marks omitted; emphasis added). In fact, the state of circuit court precedent was exactly the *opposite* of what this Court confronts here: when this Court decided *Thurston*, only one circuit had held that the FLSA's liquidated-damages provision required a showing of deliberate or intentional conduct. *See id.* at 126 & n.19; *see also Hazen Paper*, 507 U.S. at 614 (noting "accepted judicial interpretation of [the FLSA] at the time of the passage of the ADEA supported the 'knowledge or reckless disregard' standard"). Here, the Ninth Circuit's decision stands alone in adopting "reckless disregard" as the proper measure of intent for FCRA.[10]

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[10] The Ninth Circuit purported to follow the Third Circuit's decision in *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3d Cir. 1997). *See* Pet. App. 104a. In that case, the Third Circuit panel reiterated the court's prior holding in *Philbin* (*see supra* note 8) that willful noncompliance requires that a defendant "'knowingly and intentionally committed an act in *conscious* disregard for the rights of others,'" 115 F.3d at 226 (quoting *Philbin*, 101 F.3d at 970) (emphasis added), but it then

In unreflectively reading into FCRA the *Thurston* standard for willfulness under the FLSA and the ADEA, the Ninth Circuit failed to give any weight to the text and history of FCRA, or to the consistent judicial interpretations of its willfulness requirement. The Ninth Circuit's reasoning in this regard is at odds with this Court's repeated warnings against mechanically transferring the meaning of the term "willfully" from one statute to a different statutory context. *See Ratzlaf*, 510 U.S. at 141 (courts should interpret provisions requiring "willfulness" "mindful of the complex of provisions in which they are embedded"); *Murdock*, 290 U.S. at 395 (the term "willful" must be interpreted in the context of the statute's other provisions); *accord Spies*, 317 U.S. at 497; *Screws v. United States*, 325 U.S. 91, 101 (1945) (plurality opinion). Properly understood, all indications from the text, history, structure, and consistent judicial interpretation of FCRA are that Congress intended to require actual knowledge under § 1681n as a gateway to the extraordinary sanction of statutory and punitive damages, especially given the absence of any need to show actual harm.

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proceeded to state, without elaboration and without expressing any intention to abandon its holding in *Philbin*, that Trans Union could be liable for punitive damages under § 1681n if it acted "knowing [its actions] to be in contravention of the rights possessed by consumers pursuant to FCRA or in *reckless* disregard of whether" its actions were lawful, *id.* at 227 (emphasis added). It is doubtful that the *Cushman* panel intended, without any explanation, to depart materially from the "knowing violation" standard announced in *Philbin*, the very case on which the *Cushman* panel relied. *See United States v. Parker*, 462 F.3d 273, 277 n.4 (3d Cir.) ("[N]o subsequent panel overrules the holding in a precedential opinion of a previous panel.") (internal quotation marks omitted), *cert. denied*, No. 06-6568 (U.S. Oct. 16, 2006). Despite *Cushman*'s passing reference to "reckless disregard," therefore, it appears that *Philbin* continues to reflect the law of the Third Circuit.

D. An Actual-Knowledge Standard Furthers the Purposes of FCRA's Two-Tiered Remedial Scheme

In addition to believing erroneously that the "reckless disregard" standard "best comports with Supreme Court precedent," Pet. App. 127a, the Ninth Circuit reasoned that a "reckless disregard" standard "best furthers the purposes and objectives of [FCRA]," *id.* at 128a. In reality, however, the actual-knowledge standard is more consistent with the two-tiered liability structure established by Congress.

In the opening section of FCRA, Congress made clear that the Act was intended to require that "consumer reporting agencies adopt *reasonable* procedures" for ensuring the accuracy of consumer reports. 15 U.S.C. § 1681(b) (emphasis added). Similarly, the law requires users of consumer information to adopt reasonable procedures to ensure compliance with FCRA. *Id.* § 1681m(c) ("No person shall be held liable for any violation of [§ 1681m] if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of this section."). Congress thus sought to preserve a balance between protection of consumer privacy and the legitimate need of American companies to rely on consumer credit information in assessing risk and making business judgments. *See*, *e.g.*, *Stergiopoulos v. First Midwest Bancorp, Inc.*, 427 F.3d 1043, 1045-46 (7th Cir. 2005) (noting Congress's desire to strike a "balance between consumer privacy and the needs of a modern, credit-driven economy"). To create incentives for businesses to "adopt reasonable procedures," Congress enacted § 1681*o*, which, in imposing an ordinary negligence standard, effectively requires those subject to FCRA's substantive provisions to take "reasonable" care. *See generally Restatement (Second) of Torts* § 282 (defining negligence as failure to exercise reasonable care). Congress also provided those injured by any negligent failure to "adopt reasonable procedures"

with adequate incentive to file suit, by permitting recovery not only of actual damages, but also of court costs and reasonable attorney's fees. *See* 15 U.S.C. § 1681*o*. Section 1681*o* thus satisfies Congress's basic goal of compensating injured parties for lapses under the Act.

In contrast, § 1681n has a punitive purpose, in its provision of both statutory damages of from $100 up to $1,000 and, in addition, potentially unlimited punitive damages — all regardless of any actual damages.[11] Under the Ninth Circuit's rule, § 1681n imposes those extraordinary penalties not just on true malefactors that knowingly violate established law, but also on companies that simply guess wrong about how courts will ultimately construe technical requirements of the statute that have yet to be the subject of judicial interpretation. If that were the law, companies in Safeco's position would have no choice but to conform their conduct to the most expansive possible interpretation of FCRA's requirements, resulting in enormous compliance costs and the curtailment of legitimate business activities, even where that expansive interpretation is unlikely to be correct. Otherwise, companies would risk facing potentially enormous statutory damages, attorney's fees, and costs, as well as possible punitive damages. Limiting recovery of these extraordinary damages to intentional violations is thus consonant with the policies behind FCRA because it ensures that these remedies will not chill legitimate business conduct by forcing businesses to adopt *unreasonable* compliance measures in the face of legal uncertainty regarding FCRA's substantive requirements.

This concern is particularly acute in the context of FCRA, which does not limit the amount of damages (actual, statutory, or punitive) that can be recovered in a

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[11] Courts have held that actual damages are not a prerequisite to recovery of punitive damages under § 1681n. *See*, *e.g.*, *Yohay*, 827 F.2d at 972.

consumer class action.[12] Given the frequency with which credit information is commercially used, and § 1681n's $1,000-per-occurrence statutory-damages provision, the potential exposure of American business, and the windfall to plaintiffs' lawyers, is astronomical — even in the absence of any actual injury to the class-action plaintiffs these lawyers claim to represent. Contrary to the Ninth Circuit's reasoning, a "reckless disregard" standard thus undercuts, rather than effectuates, the two-tiered liability structure enacted by Congress.[13]

Imposing a more lax "reckless disregard" standard for punitive damages is also particularly inappropriate given the highly technical nature of FCRA. *Cf. Ratzlaf*, 510 U.S. at 144. Punitive damages should be reserved for cases of highly "reprehensible" conduct in which the defendant engages in conduct intending or carrying a high risk of harm — especially harm to physical health or safety. *See*, *e.g.*, *State Farm*, 538 U.S. at 419 (relevant

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[12] FCRA is thus unlike other federal consumer credit provisions, such as the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B), and the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(b), which do impose such caps.

[13] The Ninth Circuit's view that "willfully" has a categorically different meaning in civil than in criminal statutes (*see* Pet. App. 127a-128a) is overly simplistic because, as this Court has repeatedly recognized, civil punitive-damages provisions have penal characteristics. This Court has never had occasion to address the definition of "willfully" in a statute providing for punitive damages. Although *Thurston* in passing described the double-damages provision of the FLSA (incorporated into the ADEA) as "punitive in nature," 469 U.S. at 125, this Court had previously stated that those damages are "compensation, not a penalty or punishment by the Government," designed to adjust for the delay in recovery. *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 715-16 (1945). At any rate, this Court has also recognized that, even to the extent that damage multipliers such as those contained in the ADEA and the FLSA may be "'punitive' in that recovery will exceed full compensation in a good many cases," they "certainly do not equate with classic punitive damages, which leave the jury with open-ended discretion over the amount." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 131-32 (2003).

factors include whether "the harm caused was physical as opposed to economic" and whether the conduct risked compromising "the health or safety of others").

The conduct regulated by FCRA has none of these attributes of reprehensibility. As illustrated by the allegations in the complaint in this case, plaintiffs do not allege or seek *any* actual damages — nor do they claim to have suffered any non-economic harm. They do not even claim — on behalf of themselves or the class they purport to represent — that their credit information was inaccurate, nor that Safeco used their information for an unlawful purpose or in an unlawful manner. Their claim is based *purely* on an alleged failure to comply with a technical, prophylactic notice requirement that no court had ever previously interpreted in the manner the Ninth Circuit has now read it. In light of Congress's desire to balance consumer protection with legitimate business use of credit information, it is implausible that Congress intended to subject defendants to enormous statutory and punitive damages for a mere "reckless" failure to comply with FCRA's technical requirements absent true indications of reprehensibility in the form of deliberate, intentional conduct.

E. Any Residual Doubt About the Proper Interpretation of "Willfully" Should Be Resolved in Favor of an Actual-Knowledge Standard Under the Rule of Lenity

Finally, if there remains any doubt as to the meaning of "willfully" after resort to the text, history, and structure of FCRA, it should be resolved in favor of a higher *scienter* requirement under the rule of lenity. Under that rule, "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also Busic v. United States*, 446 U.S. 398, 406 (1980) (applying "the oft-cited rule that ambiguity concerning the ambit of criminal statutes should be

resolved in favor of lenity") (internal quotation marks omitted).

The rule of lenity should apply equally to a provision, such as § 1681n, providing for punitive damages — which this Court has recognized share similar characteristics to criminal sanctions. *See supra* p. 24; *see also Gore*, 517 U.S. at 583 (holding that "civil or criminal penalties that could be imposed for comparable misconduct" are a benchmark for the potential excessiveness of punitive damages). Indeed, in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court found the similarities between punitive damages and criminal sanctions so significant that it invoked the heightened presumption against statutory retroactivity applicable to criminal laws in refusing to give retrospective effect to the punitive-damages provision contained in § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. *See* 511 U.S. at 281 (Punitive and exemplary damages "share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question [under the Ex Post Facto Clause].").

Like the presumption against retroactivity, the rule of lenity is an established doctrine, founded on policies that "have long been part of our tradition": an insistence that defendants be given fair warning of what conduct is prohibited and a requirement that penal provisions — which "represent[] the moral condemnation of the community" — must be defined by legislatures, not courts. *United States v. Bass*, 404 U.S. 336, 348 (1971). Here, any doubt about the meaning of "willfully" in § 1681n should be resolved in favor of an actual-knowledge requirement. *See also* 3 Norman J. Singer, *Sutherland Statutory Construction* §§ 59.2, 59.3 (6th ed. 2001) (stating that statutory canons such as the rule of lenity should apply to all statutes that are "penal," including not only criminal provisions but also those providing for exemplary or punitive damages).

F. Under an Actual-Knowledge Standard, Summary Judgment for Safeco Was Proper

Under an actual-knowledge standard, the district court's summary judgment for Safeco was undoubtedly proper, and should have been affirmed, because "adverse action" under FCRA had *never* been interpreted by any court or the FTC to apply to initial policies of insurance.[14] As the Fifth Circuit held in *Stevenson v. TRW Inc.*, 987 F.2d 288 (5th Cir. 1993), another FCRA case, because "[t]here was no prior guidance to suggest that [the defendant's] notice was insufficient," the court "[could]not conclude that [it] knowingly and intentionally obscured the notice in conscious disregard of consumers' rights." *Id.* at 296.

II. THE NINTH CIRCUIT'S EXTREME INTERPRETATION OF THE TERM "WILLFULLY" MUST BE REJECTED

Even if this Court were to conclude that "willful" violations of FCRA can include some actions taken without knowledge that one was violating the law, it should reject the Ninth Circuit's extreme version of "reckless disregard," which would expose to unlimited punitive-damages

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[14] In the court of appeals, respondents cited a single FTC informal opinion letter, in which the FTC staff stated their belief that an "adverse action" occurs if an insurance "applicant will have to pay more for insurance at the inception of the policy than he or she would have been charged if the consumer report had been more favorable," but that letter by its own terms warned that it was "not binding on the Commission." Letter from Hannah A. Stires to James M. Ball (Mar. 1, 2000), *available at* http://www.ftc.gov/os/statutes/fcra/ball.htm. Respondents also cited the FTC's Prescribed Notice of User Responsibilities, which states that an "adverse action" is, generically speaking, an action that has a "negative impact" on a consumer. 16 C.F.R. Pt. 601, App. C (§ I.C). The specific examples of "adverse actions" conspicuously do *not* include the "best rate" scenario, instead referring to "unfavorably changing credit or contract terms or conditions, denying or canceling credit or insurance, offering credit on less favorable terms than requested, or denying employment or promotion." *Id.*

liability those whose actions are based on a legally defensible (even if ultimately incorrect) reading of the statute.

A. A Legally Defensible Statutory Interpretation Cannot Be Deemed "Willful" Even Under a "Recklessness" Standard

Any appropriate understanding of the term "willfully" under FCRA must exclude actions taken based on an interpretation of the law that is legally defensible. Conduct based on an objectively reasonable view of the law cannot even be *negligent*; much less can it entail an "unjustifiably high risk" of unlawful conduct needed to support a finding of "willfulness" even under a recklessness standard. *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (defining recklessness) (citing *Prosser and Keeton on the Law of Torts* § 34, at 213-14 (5th ed. 1984); *Restatement (Second) of Torts* § 500). This analysis applies with special force in the context of a highly technical statutory scheme like FCRA. There is simply no basis to believe that Congress, which intended to balance the legitimate interests of businesses and consumers, would have intended to subject companies to billions of dollars in potential liability for punitive and statutory damages simply because they did not accurately predict whether courts would ultimately uphold a colorable, even if not ultimately persuasive, reading of a technical provision of the statute involving, in this instance, whether certain notices must be provided. Thus, at the least, to be reckless, a legal interpretation must be more than unreasonable (*i.e.*, negligent); it must be objectively baseless.

The Ninth Circuit's understanding of "willfully," as applied in this case, lacks even this minimum protection. Safeco's legal position in the district court and the Ninth Circuit was premised on an interpretation of "adverse action" that, at the very least, is supported by a plausible understanding of the plain language and statutory purposes of FCRA. In particular, "adverse action" for insurance purposes is defined in FCRA as "a denial or cancellation of, an increase in any charge for, or a reduction or

other adverse or unfavorable change in the terms of coverage or amount of, any insurance, existing or applied for, in connection with the underwriting of insurance." 15 U.S.C. § 1681a(k)(1)(B)(i). The dictionary definition of the term "increase" is to "make something greater," and the definition of the term "charge" is the "price demanded for goods or services." Pet. App. 114a-115a.

The most straightforward interpretation of the phrase "increase in any charge" is an increase in an actual, existing premium. One does not make any "charge" greater if there is no "charge" being imposed in the first place. While the word "any" may be read to encompass all *types* of charges associated with insurance, it stretches the meaning of that word beyond the breaking point to read it to include *nonexistent*, *hypothetical* charges. At the very least, therefore, Safeco had a legitimate basis for contending, as the district court ultimately held, that there can be no "increase in any charge" unless there is a preexisting charge to increase. *See id.* at 11a-12a.

Beyond ordinary language, there are strong policy and pragmatic considerations supporting the reasonableness of Safeco's interpretation and cutting against the Ninth Circuit's position that notice is self-evidently required where an initial charge may be greater than some hypothetical charge. The Ninth Circuit's "best rate" policy dilutes Congress's "adverse action" notice requirement by making such a notice necessary in the vast majority of insurance applications. Very few policyholders — less than 15%, by one estimate — receive the absolute "best rate" when they apply for a new insurance policy. *See* Brief for the Financial Services Roundtable as *Amicus Curiae* in Support of Petitioners at 8 (filed Aug. 21, 2006) ("Roundtable *Amicus* Br."). Given the number of new policies that are issued (more than 150 million since 2001, *see* Pet. 24), the effect of the Ninth Circuit's decision will be that tens of millions of notices will be sent to consumers each year, including to consumers who received *better* rates due to their good credit scores than they would have received

had the insurer used *no* credit information in setting premiums, even though they did not get the absolute best rate that a Platonic "ideal score" might have yielded. *See* Brief for Petitioners at Part I.C, *GEICO Gen. Ins. Co., et al. v. Edo*, No. 06-100 (filed Nov. 13, 2006); *see* Pet. App. 118a (requiring notice "whenever a consumer pays a higher rate because his credit rating is less than the top potential score").

The FTC cautioned Congress against this absurd outcome when it warned in 2003 of the need "'to avoid a situation where in essence everyone is getting an adverse action notice because no one ever gets the absolute best rate.'" Roundtable *Amicus* Br. at 9 (quoting testimony of Joel Winston, Associate Director, FTC Bureau of Consumer Protection, to the Senate Committee on Banking, Housing, and Urban Affairs). Sending out more notices (and causing more "false alarms") actually *undermines* Congress's objectives because it generates significant consumer confusion. Moreover, as the FTC warned, "'[i]f you give notices too widely and in too many circumstances, then it . . . becomes something that people ignore.'" *Id.* (quoting testimony of J. Howard Beales, III, Director, FTC Bureau of Consumer Protection, to the Senate Committee on Banking, Housing, and Urban Affairs) (ellipsis in original).

The Ninth Circuit thought it significant that the statutory definition of "adverse action" refers to insurance "existing or applied for," but that phrase at most highlights a potential ambiguity in the statute; it does not resolve the ambiguity. Most of the actions described in § 1681a(k)(1)(B)(i) make sense only in the context of *either* "existing" *or* "applied for" insurance, but not both. For instance, "cancellation" has no meaning outside of "existing" policies; one cannot cancel a policy that has only been applied for. "Denial" occurs only in the context of policies that a consumer has "applied for"; one does not "deny" an existing policy, though one might well "cancel" it. With respect to the "increase in any charge" prong of "adverse

action," the most natural reading is that it applies only to *actual* charges, not hypothetical ones, and thus no such "increase" occurs outside the context of "existing" insurance. Even if there were an ambiguity, however, the phrase "existing or applied for" would not resolve it: given that both words of that phrase clearly do not modify all of the various forms of "adverse action," it remains unclear whether Congress intended an "increase in any charge" to be modified by both "existing" and "applied for," or only the former.

Significantly, the Ninth Circuit need not have resolved any ambiguity in FCRA's definition of "adverse action" (and this Court need not either) to conclude that the district court's grant of summary judgment should have been affirmed. Safeco's interpretation is not an objectively baseless reading of the plain language of the statute, and it comports with the policies of Congress in enacting FCRA. Moreover, prior to the decision below, the only judicial decisions to address the question — the district court's decisions in *Mark* and the case below — agreed with Safeco's reading, finding it not only reasonable but compelled by the plain text of the statute. In these circumstances, courts have routinely rejected a finding of willfulness as a matter of law even under the *Thurston* recklessness standard adopted (erroneously) by the Ninth Circuit.[15] The Ninth Circuit should therefore

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[15] *See*, *e.g.*, *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 702-03 (3d Cir. 1994) (willfulness could not be sustained partly because the case presented an issue of first impression, and the defendants did not violate "settled FLSA doctrine"); *Hoai v. Sun Ref. & Mktg. Co.*, Civ. A. No. 87-2456-LFO, 1991 WL 242116 (D.D.C. Oct. 28, 1991) (Oberdorfer, J.) (holding that there can be no willful violation under even a *Thurston* "reckless disregard" standard in the case of close questions of statutory interpretation absent developed case law) (citing cases), *aff'd mem.*, 18 F.3d 953 (D.C. Cir. 1994) (per curiam) (table); *cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) (to be considered a "sham" under the *Noerr-Pennington* antitrust immunity doctrine, litigation position must be "objectively baseless in the sense that no reasonable litigant could realistically expect

have affirmed summary judgment for Safeco rather than remanding for an investigation into Safeco's subjective good faith in adopting its interpretation of FCRA.

B. The Intrusive Inquiry Authorized by the Ninth Circuit Into Safeco's Decision-Making Processes Is Unwarranted

The Ninth Circuit also erred in concluding that reliance on advice of counsel is not a shield against the conclusion that an insurer acted "willfully" and could be subject to potentially billions of dollars in damages for violating a statutory provision that no court had ever concluded was contrary to the insurers' understanding. According to the Ninth Circuit, "consultation with attorneys may provide evidence of lack of willfulness, but is not dispositive." Pet. App. 129a. The court of appeals thus instructed that the district court hear "specific evidence as to how the company's decision was reached, including the testimony of the company's executives and counsel." *Id.* Under that standard, companies will be required to waive the attorney-client privilege and disclose the manner in which company lawyers came to their legal judgments, as well as the manner in which those legal judgments were communicated to and relied upon by the company's business decision-makers. *See id.* Moreover, even good-faith reliance on lawyers' legal advice may not be sufficient to avoid liability if a court later determines that the legal position taken by the company is "implausible," because, under the Ninth Circuit's extraordinary reasoning, there is a purported need to prevent companies from "employing counsel with the deliberate purpose of obtaining opinions that provide creative but unlikely answers to 'issues of first impression.'" *Id.* at 128a-129a.

This Court has never authorized such an invasive inquiry into lawyers' work product or their relationships with their clients. On the contrary, even in the very

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success on the merits"; "[o]nly if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation").

different context of the ADEA, this Court concluded that a company's actions could not have been willful *as a matter of law* where it "sought legal advice," even though the attorneys "overlooked" the key issue and consequently enacted a policy that clearly violated the ADEA. *Thurston,* 469 U.S. at 130; *see id.* at 124-25, 129 (company acted "reasonably and in good faith" where it consulted with lawyers to determine lawfulness of existing policy even though its legal position was "meritless"). Similarly, in *Ratzlaf*, this Court held that a "willful" violation of the federal anti-structuring laws "might be negated by, *e.g.*, proof that defendant relied in good faith on advice of counsel." 510 U.S. at 142 n.10.

The Ninth Circuit's refusal to recognize a complete advice-of-counsel defense under § 1681n rests on a presumption of bad faith on the part of both lawyers and clients that is unprecedented in the decisions of this Court and unwarranted as a matter of principle and policy. This Court has recognized that, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (internal quotation marks omitted). The need to consult with counsel is especially pressing where, as with FCRA, the definition of lawful conduct is "hardly an instinctive matter." *Id.*

The Ninth Circuit's view that a company's reliance on the legal advice of their corporate counsel should not be "dispositive" because such counsel might be compromised by the company's "deliberate purpose of obtaining" "creative but unlikely" legal opinions, Pet. App. 128a-129a, is at odds with this Court's recognition of the "valuable" role that counsel play "to ensure their client's compliance with the law," *Upjohn*, 449 U.S. at 392. Beyond that, it will lead to unnecessary and intrusive investigations into and discovery concerning privileged attorney-client discussions, all because the Ninth Circuit has concluded that an

insurer can "willfully" violate FCRA, and thus be subject to crushing statutory and punitive damages, even when it follows its attorneys' advice on a technical legal issue as to which no court has yet ruled. This Court should reject that understanding of the statute and reverse the Ninth Circuit decision.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for reinstatement of the judgments of the district court dismissing plaintiffs Burr's and Massey's claims.

Respectfully submitted,

SUSAN H. EPHRON
SAFECO INSURANCE COMPANY OF AMERICA
Safeco Plaza
4333 Brooklyn Avenue, NE
Seattle, Washington 98185
(206) 545-5000

LISA E. LEAR
JOHN A. BENNETT
BULLIVANT HOUSER BAILEY PC
888 S.W. Fifth Avenue
Suite 300
Portland, Oregon 97204
(503) 228-6351

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MICHAEL K. KELLOGG
Counsel of Record
SEAN A. LEV
DEREK T. HO
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

MICHAEL P. KENNY
CARI K. DAWSON
ALSTON & BIRD, LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309
(404) 881-7179

Counsel for Petitioners